Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

MICHAEL PANAYOTIDES,

Petitioner,

vs.

JULIE PANAYOTIDES,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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42pp

QUESTIONS PRESENTED

1. Did the Pennsylvania courts commit error by failing to apply the Parental Kidnapping Prevention Act (PKPA) at 28 U.S.C. Section 1738A in determining child custody jurisdiction?

2. Did the Pennsylvania courts commit error by determining that a foreign court decision implementing the Hague Convention on the Civil Aspects of International Child Abduction constitutes a child custody decree?

3. Did the Pennsylvania courts violate Petitioner's rights to procedural due process by denying Petitioner an evidentiary hearing which had been ordered by the Court in order to determine child custody jurisdiction?

4. Did the Pennsylvania courts commit error by granting full faith and credit to a foreign interim child custody order which was issued ex parte and in absentia, without the Pennsylvania courts having afforded the affected party a hearing and the opportunity to present witnesses and evidence to test the validity of the foreign order?

LIST OF ALL PARTIES TO THE PROCEEDINGS WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Respondent in this Writ of Certiorari to the Supreme Count of Pennsylvania is Julie Panayotides.

LIST OF PARENT COMPANIES AND SUBSIDIARIES.

None.

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OPINIONS BELOW

The Judgment and Memorandum of the Superior Court of Pennsylvania appears in Appendix A hereto. That opinion affirmed the Orders and Memorandum of the Court of Common Pleas, Berks County, Pennsylvania, dismissing Petitioner's Petition for Special Relief, relinquishing jurisdiction, and dismissing Petitioner's Complaint for Child Custody. The Opinion of the Court of Common Pleas appears in Appendix B hereto.

The Order of the Supreme Court of Pennsylvania, denying Allocatur appears as Appendix C hereto.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari arises from an Action for Custody by the Petitioner, Michael Panayotides. The Memorandum Opinion and Order of the ayotides. The Memorandum Opinion and Order of the Court of Common Pleas of Berks County, Pennsylvania was filed on September 16, 1997 at Case No. 96-143. A timely notice of appeal was filed in the Superior Court of Pennsylvania on October 16, 1997. A panel of the Superior Court of Pennsylvania filed its decision on July 30, 1998. Petitioner filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania on August 31, 1998. The Per Curiam Decision of the Supreme Court of Pennsylvania denying allocatur was filed on January 14, 1999.

The jurisdiction of this Court is involved under the provisions of Title 28, United States Code Section 1257.

Cases that sustain the jurisdiction of this Court include, *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1998) and *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95, 108 (1895).

STATUTES INVOLVED

Parental Kidnapping Prevention Act, Title 28 U.S.C. Section 1738A, parts 1738A(b)(4), 1738A(b)(8), 1738A(c)(1) and (2)(a), 1738A(d), 1738A(e), and 1738A(g).

STATEMENT OF THE CASE

The facts of the case underlying this Petition for Writ of Certiorari are as follows:

Petitioner, Michael Panayotides, is naturalized American citizen living in the USA since 1968.

Respondent, Julie Panayotides, is an Australian National and permanent resident of the United States since 1978.

The parties were married on November 16, 1978 in Michigan.

The parties were employed in engineering through the years.

The parties settled in Pennsylvania in 1985 and were employed by the Philadelphia Electric Company (PECO) after 1987.

The parties' son, Luke Panayotides was born in Reading, Pennsylvania on November 25, 1991. Luke was baptized in Reading, Pennsylvania in February 1992.

Luke is an American citizen, has a social security number and an American passport.

The parties took frequent vacations overseas visiting relatives.

In 1994 PECO offered early retirement to Petitioner which Petitioner accepted and became a stay-at-home dad while the Respondent continued her employment with PECO.

In 1995 the parties agreed to combine an upcoming vacation to Australia with an investigation to ascertain the feasibility of relocating there in the future. To that end, the parties purchased non-refundable round trip tickets. Respondent took four weeks vacation from work and the parties traveled to Australia on vacation, return date for July 29, 1995.

All of the parties' personal assets, real and personal property, back accounts and vehicles remained in the United States.

While in Australia, the parties stayed as guests at Respondent's mother's home.

Upon thorough investigation, the feasibility of relocation proved an impossibility. Nevertheless, despite the distinct agreement between the parties, on the return date Respondent refused to return to the United States, retained the child and instead accepted local employment.

As a result of Respondent's refusal to return home, Petitioner suffered stress shock to the extent that required medical attention and treatment.

After the medical treatment and with obligations mounting back home, Petitioner was forced to return to Pennsylvania alone on August 13, 1995, in order to take care of ongoing family obligations. Among other obligations, such as towards Respondent's brother who was living with the parties in the matrimonial home, Petitioner had to pay bills including, but not limited to, credit cards, home mortgage, utilities, telephone, subscriptions and club memberships.

On October 21, 1995, Petitioner traveled from Pennsylvania to Australia in another effect to recover Respondent and the child. Soon after arrival in Australia, Petitioner discovered that Respondent was planning to terminate the marriage while in Australia and had retained divorce counsel. In early November 1995, Respondent locked Petitioner out of her mother's house threatening to divorce Petitioner unless he agreed to liquidate the parties' assets in the United States and relocate to Australia.

On November 21, 1995, Petitioner advised Respondent that the vacation had lasted long enough, that the conditions agreed upon for relocation had not been met and that it was time for the family to return home. Respondent again refused. At this point, Petitioner informed Respondent that he was returning home with the child. Respondent disregarded Petitioner's determination and threatened him instead that she will report him to the Australian authorities for kidnapping if he left

Australia with the child. Petitioner departed Australia on the same day, and returned to Pennsylvania via Greece in order to visit his elderly mother who, in the meantime, had fallen seriously ill.

Respondent was well aware and informed by Petitioner of his and the child's whereabouts at all times, as he was in constant telephone contact with Respondent several times each day. However, Respondent continued to refuse to return home.

Unknown to Petitioner, Respondent retained counsel in Pennsylvania as early as December 8, 1995.

Petitioner and child arrived at the matrimonial home on December 29, 1995.

On or about December 28, 1995, Respondent filed in Australia an ex parte application for custody of the child.

On January 2, 1996, Respondent departed Australia to return to the United States declaring to the Immigration Authorities that she is a "permanent resident" of "Reading, Pennsylvania" and that she was returning home from a "pleasure" trip. The trip from Australia to Pennsylvania is a thirty to thirty-seven hour trip.

On January 3, 1996, an Australian magistrate issued ex parte and in absentia custody order awarding interim temporary custody of the child to Respondent.

On the same day, January 3, 1996, oblivious to the wife's action in Australia and that she was en route to the United States, Petitioner filed a custody complaint in the Berks County Court of Common Pleas in Reading, Pennsylvania.

On the same day, January 3, 1996, counsel for the Respondent appeared ex parte before the Pennsylvania trial court with an Emergency Petition for Special Relief and obtained an interim custody order of the parties' child until hearing upon said Petition.

The Petition for Special Relief contained an uncertified facsimile copy of the aforementioned Australian ex parte order issued on the same day by the magistrate in Australia.

The Rule to Show Cause issued by the trial court was returnable on January 10, 1996 and a hearing was scheduled for the same day, January 10, 1996. Minutes after counsel for Respondent obtained an ex parte order from the trial court, Respondent executed the order and took custody of the child and disappeared giving no indication of her whereabouts.

It is undisputed and the record shows that on January 9, 1996, prior to the scheduled hearing, Respondent fled from Pennsylvania with the child and returned to Australia.

On January 10, 1996, inclement weather kept the Court closed until January 16, 1996.

On January 16, 1996, counsel for Respondent withdrew the Emergency Petition for Special Relief he had filed on January 3, 1996.

However, on January 16, 1996, the Berks County Court continued the hearing of Respondent's Emergency Petition for Special Relief to January 31, 1996.

On January 18, 1996, the Berks County Court entered an order pursuant to Petitioner's Custody Complaint

filed on January 3, 1996, scheduling a custody hearing for March 7, 1996 and ordering that neither party remove the child from the jurisdiction of the Court.

On January 31, 1996, Petitioner appeared before the Berks County Court, which upon being informed that Respondent had fled the jurisdiction, entered an Order vacating the earlier interim temporary Order by the trial court of January 3, 1996, awarded custody to Petitioner and issued a Rule to Show Cause to Respondent, returnable on February 7, 1996.

On February 2, 1996, Petitioner applied to the United States Department of State invoking the Hague Convention on the Civil Aspects of the International Child Abduction,[1] implemented in the United States through the International Child Abduction Remedies Act (ICARA), Title 42 U.S.C. Section 11601 et seq.

At the hearing of February 7, 1996, Respondent filed, through counsel, Preliminary Objection to Petitioner's Custody Complaint of January 3, 1996 and requested to

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[1] A summary hearing upon Petitioner's Hague Convention Application was held in Australia on May 30, 1996. The Australian Court rendered its decision on May 31, 1996, refusing to return the child on Petitioner's assertion that the Hague Convention is inapplicable because the child's habitual residence had "changed to Australia in July or August 1995". Petitioner filed a timely appeal to the Full Court of the Family Court of Australia, which, on December 6, 1996 affirmed the lower Court's decision. Petitioner's timely Application for Leave to Appeal to the High Court of Australia was denied on June 26, 1997.

conduct discovery in support of her Preliminary Objections. Concurrently, Petitioner filed Objections to Jurisdiction in the Australian Court through his solicitors in Australia.[2]

In response to Respondent's Preliminary Objections, the trial court entered an order staying indefinitely all further proceedings until completion of discovery upon Respondent's Preliminary Objections.

On February 23, 1996, Petitioner filed an Answer to Respondent's Preliminary Objections, however, Respondent failed to proceed with completion of discovery in support of her Preliminary Objections

On July 24, 1996, realizing that Respondent had no intention of proceedings with discovery, Petitioner filed a Petition for Special Relief requesting, inter alia, the lifting of the stay dated February 7, 1996.

On August 26, 1997, the trial court denied Petitioner's Petition and refused to lift the stay.

On February 14, 1997, Petitioner filed another Petition for Special Relief requesting lifting the stay of February 7, 1996. Also, Petitioner filed the following motions:

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[2] Although Petitioner has repeatedly filed Objections to Jurisdiction in the Australian Court, last filing occurred on June 6, 1997, and although the Australian Court has announced that it may not hear Respondent's Custody and other applications until after Petitioner's Objections to Jurisdiction have been determined, as of this date, the Australian Court has not made a decision on Petitioner's Objections to Jurisdiction, much less determined child custody.

(a) Motion to Strike Respondent's Preliminary Objections for failure to proceed or, in the alternate, a Motion to Order and schedule an evidentiary hearing on jurisdiction;

(b) Motion to Strike Respondent's Preliminary Objections as a result of Respondent having submitted to jurisdiction; and

(c) Motion of an expedited hearing pursuant to Title 23 Pa. C.S.A. Section 5366.

On February 23, 1997, the trial court entered an Order for an evidentiary hearing to hear the disputed issues of material fact and scheduled a hearing for April 23, 1997. On April 23, 1997, despite the trial court's orders and while witnesses were on stand-by, the trial court did not hold the hearing but requested counsel to supply additional briefs on the issue of whether an evidentiary hearing should be held.

On September 16, 1997, the trial court entered a memorandum opinion and order dismissing Petitioner's custody complaint of January 3, 1996 and relinquishing jurisdiction.

However, there exists no other qualified jurisdiction to relinquish jurisdiction to. As a consequence of the aforementioned trial court order, the child's custody remains in legal limbo for over three years to this day.

The federal questions to be reviewed were raised by timely objections, appropriate motions, by briefs and argument in the Court of Common Pleas of Berks County,

Pennsylvania, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Courts have created a "truly intractable jurisdictional deadlock" whereby Petitioner has been left with no court in which to claim his parental rights.

This Petition for Writ of Certiorari raises important and substantial questions of Federal law not previously addressed, and which must be settled in court.

The instant case should be reviewed by this Court for the following reasons:

1. This Honorable Court discusses the PKPA in *Thompson v. Thompson*, 484 US 174, 108 S.Ct. 513, 98 L.Ed.2d 512:

> As the legislative scheme suggests, and as congress explicitly specified, one of the chief purposes of the PKPA is to "avoid jurisdictional Competition and conflict, between State courts". Pub L 96-611, 94 Stat 3569 Section 7(c)(5), note following in 28 USC Section 1738A [28 USCS Section 1738]. *Id.* at 519.
>
> In order for the Pennsylvania courts to decide whether a foreign custody order is consistent with the PKPA in determining the appropriate jurisdiction the court must analyze the following:

a) Whether the foreign custody order was obtained from a "state" as defined at 1738A(b)(8);

b) What is the "home state" of the child as defined at 1738A(b)(4);

c) Whether the child custody determination made by a court of a State is consistent with the following: I) the court of jurisdiction under the law of the State and

(ii) Such state is the home state of the child. See 1738A(c)(1) and (2)(A);

d) Whether the foreign court made a child custody determination consistent with the PKPA. See 1738A(d);

e) Whether the foreign court gave reasonable notice and opportunity to be heard to the parties prior to the child custody determination. See 1738A(e), and

f) Whether the Pennsylvania courts shall exercise jurisdiction for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction pursuant to the PKPA. See 1738A(g).

It is undisputed that Pennsylvania is the "home state" of the Petitioner and his child pursuant to 1738A(b)(4). Under the facts of this case 1738A(c)(2) authorizes only the courts of the Commonwealth of Pennsylvania to hear and adjudicate Petitioner's custody complaint. In the instant case, no court, domestic or foreign, has asserted or exercised child custody jurisdiction pursuant to the PKPA, nor is any State, domestic or foreign,

qualified to exercise child custody jurisdiction pursuant to the PKPA, except Pennsylvania.

This Honorable Court has indicated that it will avail itself for review of truly intractable Cases involving jurisdiction:

> ". . . . Ultimate review remains available in this Court for truly intractable jurisdictional deadlocks." See *Thompson* at 525.

The treatment of Petitioner's child custody complaint by Pennsylvania courts have created a "truly intractable jurisdictional deadlock", whereby Petitioner has been left with no court in which he can claim his constitutionally protected right to the companionship, care, custody and management of his child.

2. The Hague Convention on the Civil Aspects of International Child Abduction reflects a universal concern about the harm done to children by parental kidnapping and a strong desire among the Contracting States to implement an effective deterrent to such behavior. Both the United States and Australia are signatory nations. The United States Congress implemented that Convention in the International Child Abduction Remedies Act, 42 U.S.C. Section 11601 et seq., expressly recognizing its "international character" and the "need for universal international interpretation" of its provision. 42 U.S.C. Section 11601(6)(2), (3)(B) in Australia, the Convention was implemented by the Family Law (Child Abduction Convention) Regulation made pursuant to s111B of the Family Law Act of 1975.

   The Convention approach to the phenomenon of international child abduction is straightforward. It is designed to restore the "factual" status quo which is

> unilaterally altered when a parent abducts a child and aims to protect legal Custody rights of the non-abducting parent. Pub. Notes, 51 Fed. Reg. 10494, 10505 (1986). Thus, the cornerstone of the Convention is the mandatory return of the child from, or retention in a Contracting State, has violated the custody rights of the other, and is, therefore, "wrongful". Hague Convention, Article 12. *See Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995).

The objects of the Hague Convention are stated in Article 1:

> The objects of the present Convention are –
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 1(b) is of import. Which court determines the existence of custody under the laws of the United States are clearly defined by the PKPA. Thus, a decision under the Convention does not constitute a custody determination. Article 19 of the Constitution states:

> A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

The aforementioned was pronounced in *Friedrich v. Freidrich*, 78 F.3d 1060, 1063 (6th Cir 1996), "First a Court in the abducted to nation has Jurisdiction to decide the merits of an abduction claim, but not the merits of the

underlying Custody dispute. *See Hague Convention*, Article 19; 42 U.S.C. Section 11601(b)(4)."

In relinquishing jurisdiction and dismissing Petitioner's Complaint for Custody, the trial court relied upon a decision by the Family Court of Australia concerning international law and internal foreign law (not the PKPA). The hearing held before the Australian Court was by definition a "summary hearing" pursuant to International Law and concerned exclusively the wrongful removal of the parties' child from the United States. The issues before the Australian Court did not concern jurisdiction as it relates to the underlying custody action. Neither the Australian Judge nor the Judicial Registrar who issued the Order of January 3, 1996 were "exercising jurisdiction pursuant to the PKPA."

Consequently, the jurisdictional factors and criteria predicated by the PKPA were neither addressed nor met during the adjudication of the Hague Convention matter.

When an American citizen travels to another country with their children, they expect that their parental rights continue to be protected and enforceable upon their timely return to their "home state". Further, American citizens expect that their parental rights are protected even when traveling to a foreign country signatory to the Hague Convention, and do not remain there for more than six months. Violation of the PKPA, either by domestic or foreign courts can and does play havoc with parental rights and renders the PKPA, the ICARA and the Hague Convention inoperable.

If allowed to stand, this misconstruction of international law which has not been previously addressed or

settled by any court of competent jurisdiction in this country, is likely to result in exhaustive continuing litigation for countless parents, as it did in the instant case at the cost of literally hundreds of thousands of dollars in legal fees and expenses in two countries, and as such commands review and settlement by this Honorable Court.

3. The Courts below, in their various decisions violated Petitioner's right to procedural due process pursuant to the Fourteenth Amendment of the United States Constitution.

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct 652, 94 L.Ed. 865, 872 (1950); *see also Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) and *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct 1187, 14 L.Ed.2d 62 (1965).

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 10, 25 L.Ed.2d 287, 300 (1970).

The right of a litigant to an in court presentation is essential to due process. In the present case, Petitioner was granted an evidentiary hearing to determine jurisdiction and on the day of the hearing the trial court denied said evidentiary hearing and ordered a briefing schedule.

Without a hearing in which to litigate the numerous controverted material facts, the Pennsylvania courts attempted to justify its decision based upon assumptions that were erroneous at law as well as grossly erroneous in fact. As a result, Petitioner suffered the hardest mistreatment a parent can be subjected to, the permanent deprivation of his parental rights, for no fault of his own, without as much as a hearing, and without any cause, real or alleged.

4. The Courts below have set precedence by completely ignoring this Honorable Court's long standing decision upon international comity. The Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct 139, 40 L.Ed. 95, 108 (1895) defines comity as:

> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own actions or of other persons who are under the protection of its laws.

Further, "Every foreign judgment of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon proceedings and due notice." *Hilton* at 109; *see also* 28 U.S.C. 1738A(d)(e) and (g).

When a party attempts to enforce a foreign judgment in a court of competent jurisdiction the adverse party has the right to defend said action and have the trial court

review said foreign judgment to see whether the judgment was rendered via fraud, whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence and whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just. *See Turner Entertainment Co. v. Degreto Film Gmb H*, 25 F.3d 1512 (11th Cir 1994).

In the case at bar, the Pennsylvania courts have assumed that court orders issued by a foreign country are enforceable in this country independent of the constitutional requirements for due process guaranteed by the Fourteenth Amendment, independent of the statutory requirement of the UCCJA as codified in Pennsylvania in 23 Pa. C.S.A Section 5365 and independent of traditional notions of fair play and substantial justice.

First, said foreign orders, referred to in the memoranda of the lower courts where issued ex parte and in absentia. Second, no petition exists from Respondent requesting that the State enforce said foreign orders, as the petition was withdrawn from the State court prior to the State court having the opportunity to hear and adjudicate the merits of Respondent's petition. Third, although the State court made orders on January 3, 1996, purportedly enforcing the foreign orders those orders had been vacated nevertheless, prior to the State courts' renditions of their subsequent judgments. Thus, the State courts erred in enforcing foreign orders made ex parte by invocation of a domestic ex parte order which had been previously vacated and never reinstated. The justification given by the trial court and upheld by the State Appellant

Courts is inconsistent with and violates federal case law, federal statutory law and the United States Constitution.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays this Honorable Court to grant the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania and submits that this Petition brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted by:

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APPENDIX

Appendix A – Judgment and Opinion of the Superior Court of Pennsylvania 1a

Appendix B – Decision of the Honorable Arthur E. Grim of the Court of Common Pleas of Berks County, Pennsylvania 9a

Appendix C – Decision of the Supreme Court of Pennsylvania 18a

APPENDIX A

MICHAEL PANAYOTIDES,	:	IN THE SUPERIOR COURT
Appellant	:	OF PENNSYLVANIA
	:	
vs.	:	
	:	
JULIE PANAYOTIDES	:	
	:	
Appellee	:	No. 4308 Philadelphia 1997

Appeal from the Order entered September 16, 1997 in the Court of Common Pleas of Berks County, Civil Division, at No. 96-143.

BEFORE: DEL SOLE, JOYCE and HOFFMAN*, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BERKS *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ Illegible
PROTHONOTARY

Dated: July 30, 1998

MICHAEL PANAYOTIDES,	:	IN THE SUPERIOR COURT
Appellant	:	OF PENNSYLVANIA
	:	
v.	:	
	:	
JULIE PANAYOTIDES	:	
	:	
Appellee	:	No. 4308 Philadelphia 1997

Appeal from the Order entered September 16, 1997 in the Court of Common Pleas of Berks County, Civil Division, at No. 96-143.

BEFORE: DEL SOLE, JOYCE and HOFFMAN*, JJ.

MEMORANDUM:

(Filed Jul. 30, 1998)

Husband Michael Panayotides brings this appeal from an order dismissing his petition for special relief and relinquishing jurisdiction and dismissing his complaint for custody.

The facts, as supplied by the trial court, are as follows.

> Husband was born in Greece and became a naturalized United States citizen. Wife was born in Australia. The parties married in November, 1978. Throughout their marriage they have lived in the United States; Wife, however, never obtained United States citizenship status. Their child, Luke was born in Pennsylvania on November 25, 1991.

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* Judge Hoffman did not participate in the consideration or decision of this case.

For a long time during the marriage Wife desired to return to Australia to live and she became more impatient to do so after Luke's birth. In 1995 the parties decided to travel to Australia to explore opportunities to live there. Husband was reluctant to do so but he agreed to go to Australia to start a new life in order to save his family. The parties agree that before they would establish residence in Australia certain condition had to be met. Their concerns were primarily financial. The parties disagree as to whether the conditions were satisfied. Wife claims that they were, Husband insists that they were not.

In preparation for relocating to Australia Husband applied to the Department of Immigration for permanent residence. In his application Husband asserted, "Luke is an Australian citizen. He will be relocating to Australia with my wife and myself," and "My spouse is an Australian citizen who is relocating to Australia with me."

Husband was unemployed in 1995. He went alone to Australia in June, 1995, to explore employment opportunities. Wife arrived with Luke in Australia approximately two weeks later. Although Husband was unable to secure employment, Wife quickly found a good job. She then resigned from her job in Pennsylvania.

Both parties applied for resident drivers' licenses and tax numbers in Australia.

The parties listed the marital residence in Pennsylvania for sale. They enrolled Luke in a preschool even though Husband was unemployed. They also enrolled Luke in the attached school for the 1996 school year.

Husband returned to the United States to check on the parties' property in August, 1995. While Husband was in Pennsylvania he sent Wife $20,000.00 from their joint savings account.

In October, 1995, Husband again returned to Pennsylvania. At that time he made arrangements to ship the parties' property, including furniture, to Australia.

In Australia Wife processed and secured a housing loan in joint names with a bank for the purpose of acquiring a home. Husband contacted several financial institutions to inquire about the terms of housing loans. In November, 1995, the parties signed a lease of six months for a rental property.

Immediately after moving into the rental property the parties had a serious argument. Wife refused to return to the United States as Husband wanted her to do. On the day following the argument Husband took Wife, as he usually did, to the train station for her to take a train to work. He then took the child with him to the airport and without Wife's knowledge or consent took the child to visit relatives in Greece. On December 29, 1995, after spending approximately one month in Greece, Husband returned with the child to the former marital residence in Pennsylvania.

Wife filed for custody of Luke on December 28, 1995, in Australia. On January 3, 1996, the Australian court granted her Petition For Interim and Final Custody.

On January 3, 1996, (January 4, 1996, in Australia) Husband filed for custody in Berks County.

On that same day in Berks County, Wife was granted an ex parte Temporary Custody Order on the basis of the Australian Order. A hearing was set for January 10, 1996. Due to a blizzard the hearing was continued; however, on January 9, 1996, Wife returned to Australia with Luke.

On January 16, 1996, Wife withdrew her petition for temporary custody in Berks County.

Wife filed preliminary objections to jurisdiction of this court. By Order of February 7, 1996, the court stayed further proceedings and provided for the creation of a record by deposition prior to rendering a decision on jurisdiction. The depositions have never been completed.

On March, 1996, in Australia Husband filed an application under the Hague Convention for the return of Luke to Pennsylvania. On June 6, 1996, the Australian court found that Australia was Luke's habitual residence because the parties had relocated to Australia with the intent to reside there permanently. The court therefore denied Husband's application because the child was not wrongfully removed from the United States.

Husband appealed the decision. The appeal was dismissed on December 6, 1996. Husband then filed an appeal to the High Court of Australia.

On January 30, 1997, Husband filed a Petition for Special Relief which was denied by this court on March 18, 1997.

On February 14, 1997, Husband filed this instant petition. Argument was held on April 23, 1997. The pleadings were closed on June 6, 1997.

Trial Court Opinion, 9/16/97, at 1-4.

Thereafter, the trial court issued an order dismissing Appellant's petition for special relief, relinquishing jurisdiction and dismissing Appellant's complaint for custody. This appeal followed. We affirm.

The basic issue before this court is whether the trial court properly relinquished its jurisdiction and dismissed the complaint for custody.[1] Appellant argues that the trial court erred in determining that it lacked jurisdiction to hear the custody matter.

In order to have the power to determine the right to custody as between litigants, a court must have subject matter jurisdiction over the person of the child. ***Brandt v. Brandt,*** 580 A.2d 320 (Pa.Super. 1990). A determination of jurisdiction must be made at the time of the commencement of the instant proceeding. ***Simpkins v. Disney,*** 610 A.2d 1062 (Pa.Super. 1992). To determine whether Pennsylvania has jurisdiction to entertain Husband's custody

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[1] While Husband's brief presents the following four issues for review, we will not address the issues except to say that each of Husband's arguments is unavailing. (1) Whether the trial court erred by denying Appellant an evidentiary hearing upon the merits to determine jurisdiction. (2) Whether the trial court erred by failing to strike Appellee's preliminary objections for failure to proceed in accordance with the Pennsylvania Rules of Civil Procedure. (3) Whether the trial court erred by holding that Appellee did not submit to this jurisdiction when Appellee filed an *ex parte* emergency petition for special relief on January 3, 1996. (4) Whether the trial court erred in holding that the decision of the Australian Family Court implementing the Hague Convention on the Civil Aspects of International Child Abduction determined that Australia is the appropriate jurisdiction to hear the child custody matter.

complaint, we refer to the Uniform Child Custody Jurisdiction Act (UCCJA), 23 Pa.C.S.A. §§ 5301-5366, which was adopted to provide measures for dealing with interstate and international custody problems. ***Warman v. Warman,*** 439 A.2d 1203 (Pa.Super. 1982).

We begin by stating that when we review a trial court's decision not to exercise jurisdiction under the terms of the UCCJA, this court will not reverse the trial court's decision except for abuse of discretion. ***Merman v. Merman,*** 603 A.2d 201 (Pa.Super. 1992). We are also mindful that the purpose of the UCCJA is to provide stability to the home environment and to family relationships by discouraging continuing controversy over child custody and visitation, to avoid jurisdiction disputes, to deter objections, to avoid relitigation, to promote comity, and to assure that litigation concerning child custody takes place ordinarily in the state in which the child and his family have the closest connection. ***Barndt v. Barndt,*** *supra.* An additional purpose of the UCCJA is to prevent the kidnapping or snatching of children from one jurisdiction to another. ***Haynes v. Willock,*** 431 A.2d 341 (Pa.Super. 1981). This court has held that the intent of the UCCJA has always been that its general policies shall apply to international custody cases. ***Hattoum v. Hattoum,*** 441 A.2d 403 (Pa.Super. 1982).

From our perspective, the courts of Pennsylvania cannot exercise jurisdiction in this matter. Here, Wife initiated custody proceedings in the Family Court division of Queensland, Australia on December 28, 1995 (December 27, 1995 in the United States) and was granted a custody order on January 3, 1996 (January 2, 1996 in the United States). The following day, (January 3, 1996 in the

United States) Husband filed the instant custody complaint in Berks County. The trial court was fully aware of the existence of the Australian Court order because that same day Wife filed in Berks County an emergency petition seeking enforcement of the Australian Court order.

The UCCJA provides:

> The general policies of this subchapter extend to the international area. The provisions of this subchapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

42 Pa.C.S.A. § 5365.

Once the trial court was satisfied that the Australian Court properly exercised its jurisdiction under the conditions of UCCJA and Husband had notice and participated in the Australian Court proceedings, the trial court was required to decline jurisdiction. 42 Pa.C.S.A. § 5365. Moreover, the record supports the determination that Australia is the home nation of the child. Therefore, further proceedings in Pennsylvania would be futile.

Order affirmed.

APPENDIX B

MICHAEL PANAYOTIDES	:	IN THE COURT OF
	:	COMMON PLEAS OF
vs.	:	BERKS COUNTY,
JULIE PANAYOTIDES	:	PENNSYLVANIA
	:	CIVIL ACTION – LAW
	:	
	:	No. 96-143
	:	
	:	CUSTODY
	:	

ORDER

(Filed Sep. 17, 1997)

AND NOW, September 16, 1997, after consideration of the pleadings, briefs, record, and argument of counsel, it is hereby Ordered as follows:

1. Plaintiff's Petition for Special Relief is dismissed.

2. The court relinquishes jurisdiction and dismisses plaintiff's Complaint for Custody.

BY THE COURT:

/s/ Arthur E. Grim
ARTHUR E. GRIM,
JUDGE

MICHAEL PANAYOTIDES	:	IN THE COURT OF
	:	COMMON PLEAS
vs.	:	OF BERKS COUNTY,
	:	PENNSYLVANIA
JULIE PANAYOTIDES	:	CIVIL ACTION – LAW
	:	
	:	No. 96-143
	:	
	:	CUSTODY

(Filed Sep. 17, 1997)

Gregory D. Henry, Esquire, Attorney for Plaintiff

Randy A. Rabenold, Esquire, Attorney for Defendant

MEMORANDUM OPINION, GRIM, J. September 16, 1997

This case is before the court on plaintiff's Petition For Special Relief Pursuant to Pa. R.C.P. 1915.13. The following are the pertinent uncontroverted facts gleaned from the record and procedural history.

Plaintiff, Michael Panayotides, and defendant, Julie Panayotides, are husband and wife. Plaintiff (hereinafter, Husband) was born in Greece and became a naturalized United States citizen. Defendant (hereinafter, Wife) was born in Australia. The parties married in November, 1978. Throughout their marriage they have lived in the United States; Wife, however, never obtained United States citizenship status. Their child, Luke, was born in Pennsylvania on November 25, 1991.

For a long time during the marriage Wife desired to return to Australia to live and she became more impatient to do so after Luke's birth. In 1995 the parties decided to travel to Australia to explore opportunities to live there. Husband was reluctant to do so but he agreed to go to

Australia to start a new life in order to save his family. The parties agreed that before they would establish residence in Australia certain conditions had to be met. Their concerns were primarily financial. The parties disagree as to whether the conditions were satisfied. Wife claims that they were, Husband insists that they were not.

In preparation for relocating to Australia Husband applied to the Department of Immigration for permanent residence. In his application Husband asserted, "Luke is an Australian citizen. He will be relocating to Australia with my wife and myself," and "My spouse is an Australian citizen who is relocating to Australia with me."

Husband was unemployed in 1995. He went alone to Australia in June, 1995, to explore employment opportunities. Wife arrived with Luke in Australia approximately two weeks later. Although Husband was unable to secure employment, Wife quickly found a good job. She then resigned from her job in Pennsylvania.

Both parties applied for resident drivers' licenses and tax numbers in Australia.

The parties listed the marital residence in Pennsylvania for sale. They enrolled Luke in a preschool even though Husband was unemployed. They also enrolled Luke in the attached school for the 1996 school year.

Husband returned to the United States to check on the parties' properties in August, 1995. While Husband was in Pennsylvania he sent Wife $20,000.00 from their joint savings account.

In October, 1995, Husband again returned to Pennsylvania. At that time he made arrangements to ship the parties' property, including furniture, to Australia.

In Australia Wife processed and secured a housing loan in joint names with a bank for the purpose of acquiring a home. Husband contacted several financial institutions to inquire about the term of housing loans. In November, 1995, the parties signed a lease of six months for a rental property.

Immediately after moving into the rental property the parties had a serious argument. Wife refused to return to the United States as Husband wanted her to do. On the day following the argument Husband took Wife, as he usually did, to the train station for her to take a train to work. He then took the child with him to the airport and without Wife's knowledge or consent took the child to visit relatives in Greece. On December 29, 1995, after spending approximately one month in Greece, Husband returned with the child to the former marital residence in Pennsylvania.

Wife filed for custody of Luke on December 28, 1995, in Australia. On January 3, 1996, the Australian court granted her Petition For Interim and Final Custody.

On January 3, 1996, (January 4, 1996, in Australia) Husband filed for custody in Berks County.

On that same day in Berks County, Wife was granted an ex parte Temporary Custody Order on the basis of the Australian Order. A hearing was set for January 10, 1996. Due to a blizzard the hearing was continued; however, on January 9, 1996, Wife returned to Australia with Luke.

On January 16, 1996, Wife withdrew her petition for temporary custody in Berks County.

Wife filed preliminary objections to jurisdiction of this court. By Order of February 7, 1996, the court stayed further proceedings and provided for the creation of a record by deposition prior to rendering a decision on jurisdiction. The depositions have never been completed.

On March, 1996, in Australia Husband filed an application under the Hague Convention for the return of Luke to Pennsylvania. On June 6, 1996, the Australian court found that Australia was Luke's habitual residence because the parties had relocated to Australia with the intent to reside there permanently. The court therefore denied Husband's application because the child was not wrongfully removed from the United States.

Husband appealed the decision. The appeal was dismissed on December 6, 1996. Husband then filed an appeal to the High Court of Australia.

On January 30, 1997, Husband filed a Petition for Special Relief which was denied by this court on March 18, 1997.

On February 14, 1997, Husband filed this instant petition. Argument was held on April 23, 1997. The pleadings were closed on June 6, 1997.

The court shall now address the issue of jurisdiction. Plaintiff requests the court to hold an evidentiary hearing to determine whether or not this court has jurisdiction for custody proceedings.

A case closely analogous to this case is ***Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995).** In that case

Father who lived in Australia petitioned for the return of his minor child pursuant to the Hague Convention on Civil Aspects of International Child Abduction, asserting that Mother had violated his parental rights. The court stated that a child's "habitual residence" for purposes of an action for the return of the child pursuant to the Hague Convention is the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's prospective. A determination must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding the child there.

The facts in ***Feder*** are quite similar to those in the case *sub judice*. Father's employment in Pennsylvania was terminated. He began exploring a job opportunity in Australia. Although Father greeted the possibility of living and working in Australia with enthusiasm, Mother approached it with considerable hesitation. The family traveled to Australia to evaluate the opportunity. Mother went along to work toward salvaging her marriage. She was ambivalent about the move; while she hoped that her marriage would be saved, she was not committed to remaining in Australia. Father purchased a home in Australia and arranged for a moving company to ship their furniture. The child attended nursery school in Australia and was enrolled in kindergarten there. Mother applied to have the child admitted to a private school for fifth grade, seven years later.

Father changed his driver's license registration from Pennsylvania to Australia. He completed the paperwork necessary to obtain permanent residence for the family.

All of the family obtained Australian Medicare cards, giving them access to Australia's health care system.

Mother, however, neither surrendered her Pennsylvania driver's license nor submitted to a physical examination or signed the papers required of those seeking permanent residency status.

The *Feder* court reasoned that under the Act, in the absence of any court order, each parent is a joint guardian and joint custodian of the child, and guardianship and custodial rights involve essentially the rights to have and to make decisions concerning the daily care and control of the child. Therefore, it held that the mother's unilateral decision to retain the child in the Untied [sic] States after a visit was wrongful within the meaning of Article 3 of the Convention.

In the case *sub judice* the parties did as much as the parties did in ***Feders to establish residency in Australia. Thus, this court cannot find that the Australian court was wrong in establishing Australia as Luke's "habitual residence."***

At the time Husband left Australia with Luke no court order existed. Thus, each parent was a joint guardian and custodian of the child. It is undisputed that Wife did not know that Husband was leaving Australia with Luke, so she certainly had not given her consent to the act. Therefore, Wife's removal of the child back to Australia, the child's habitual residence, was not wrongful within the meaning of the Act. The court agrees with the Australian court's decision.

Although a Hague Convention decision may not decide the ultimate decision of custody jurisdiction in all cases, it clearly impacts on the issue in this case. A competent court has already found that Australia is the child's current domicile. Clearly, then Pennsylvania was not the home state of the child at the time Father commenced his action.

Father argues that Pennsylvania had been the home state of Luke within six months before the commencement of this proceeding.

Mother and Luke left Pennsylvania on July 2, 1995. Father filed for custody in Pennsylvania in January, 1996. The child's residence changed sometime after the relocation to Australia so this basis for jurisdiction is barely met. The court finds that for the following reasons jurisdiction should not be exercised by this court.

The home state of children within the meaning of the Uniform Child Custody Jurisdiction Act (UCCJA) is not always the most appropriate jurisdiction for the determination of custody, particularly where parties have recently left their residence in the home state or intent to do so in the near future. Dincer v. Dincer, **446 Pa. Super. 1, 666 A.2d 281 (1995),** *reargument denied, appeal granted in part,* **545 Pa. 171, 680 A.2d 873.**

Australia is now the child's residence. The child's relatives reside in Australia. Luke's care providers are in Australia. Luke attends school in Australia. Wife is employed in Australia. The only significant connection Luke has to Pennsylvania is Husband.

The best interest of a child in a custody dispute is served by the forum with the optimum access to relevant evidence about the child and family and, thus, determination of a child's home state does not automatically confer jurisdiction upon that state under UCCJA. ***Baines v. Williams*, 431 Pa. Super. 72, 635 A.2d 1077 (1993).**

This court finds that Australia is the more appropriate forum due to the child's significant connections to Australia. The court will not exercise jurisdiction simply because Pennsylvania has been the child's home state prior to relocating to Australia.

The court will not interpret Australian law as to whether or not Wife's temporary order for custody could be registered in Pennsylvania, especially since two Australian solicitors, presumably knowledgeable in Australian law, cannot agree on the issue. More importantly, the court believes this issue is immaterial because Wife's order had no basis in this decision.

The court does not find that wife submitted to this court's jurisdiction. Wife petitioned the court to enforce the Australian custody order to allow her to return to Australia with Luke. **23 Pa. C.S.A. § 5354** provides that the courts of this Commonwealth shall recognize and enforce foreign decrees. The court does not find that by filing a petition to enforce her custody order, Wife has submitted to this jurisdiction for a custody trial.

Accordingly, the court enters the following Order.

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MICHAEL PANAYOTIDES, Petitioner v. JULIE PANAYOTIDES, Respondent	:	No. 0737 M.D. Alloc. Dkt. 1998 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 14th day of January, 1999, the Petition for Allowance of Appeal is hereby **DENIED.**